

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHANNON MCMINIMEE,

Plaintiff,

v.

YAKIMA SCHOOL DISTRICT NO.
7, and JOHN R. IRION, in his
individual capacity,

Defendants.

NO. 1:18-CV-3073-TOR

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT AND DENYING AS
MOOT DEFENDANTS' MOTION
FOR LEAVE TO FILE
DECLARATION

BEFORE THE COURT are Defendants' Motion for Summary Judgment (ECF No. 45) and Defendants' Motion for Leave to File the Declaration of Karen Hovis (ECF No. 66). These matters were submitted for consideration without oral argument. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, Defendants' Motion for Summary Judgment (ECF No. 45) is **GRANTED in part** and **DENIED in part** and Defendants' Motion for Leave to File the Declaration of Karen Hovis (ECF No. 66) is **DENIED as moot**.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND DENYING AS MOOT
DEFENDANTS' MOTION FOR LEAVE TO FILE DECLARATION ~ 1

BACKGROUND

This case arises out of Plaintiff Shannon McMinimee's employment with the Yakima School District ("YSD"). *See* ECF No. 26. Plaintiff alleges that Defendants violated state and federal law by, *inter alia*, placing her on administrative leave and not renewing her employment contract because of her various oppositional activities. *Id.* As outlined below, Defendants seek summary judgment on all of Plaintiff's causes of action. ECF No. 45. The following facts are not in dispute except where noted.¹

A. Plaintiff Hired at YSD

In early March 2017, Plaintiff applied for the position of Superintendent of Human Resources for the Yakima School District. ECF No. 51 at 1, ¶ 1. On March 13, 2017, Superintendent Dr. John ("Jack") Irion provided Plaintiff with a Letter of Intent to hire Plaintiff as the Associate Superintendent of Human Resources. ECF No. 51 at 2, ¶ 2. The offer letter stated that Plaintiff's employment would be subject to the terms and conditions of a Collective

¹ Defendant's Statement of Facts largely fails to cite to the record in violation of Local Civil Rule 56(c)(1)(A). Therefore, after reviewing the entire record, the Court generally relies on the cited record in Plaintiff's Counter Statement of Facts and Defendants Reply Statement of Facts. *See* ECF Nos. 46, 51, 57.

1 Bargaining Agreement (“CBA”). ECF No. 51 at 4, ¶ 10. However, the CBA
2 referred to in the document did not exist. ECF No. 51 at 4, ¶ 10; ECF No. 57 at 3,
3 ¶ 10. Plaintiff produced a CBA that she allegedly relied on that is between the
4 “Yakima Principals’ and Directors’ Associations and Yakima Public Schools.”
5 ECF No. 52-2. The CBA plainly states that the CBA applies to administrators who
6 “are not recognized by the superintendent as members of the principals’ or
7 assistant/associate superintendents’ group.” ECF No. 52-2 at 6, ¶ 1.2(B).

8 Plaintiff’s one-year contract applied to the 2017-2018 school year. ECF No.
9 46-1 at 32. It is undisputed that Plaintiff does not hold any professional
10 certifications. ECF No. 46-1 at 4, ¶ 9. YSD reported Plaintiff as a certificated
11 administrator for the purposes of reporting to Office of Professional Practices
12 (“OPP”) with the Office of Superintendent of Public Instruction (“OSPI”) because
13 there are no reporting categories for non-certificated administrators. ECF No. 51
14 at 58, ¶ 158; ECF No. 57 at 19-20, ¶ 157.

15 The parties dispute where Plaintiff was initially placed on the salary pay
16 scale when she accepted the offer of employment: Plaintiff asserts that she was told
17 she would be placed at Step 6 of the Associate Superintendent pay scale and
18 Defendants assert that she was hired at Step 1 of the Associate Superintendent pay
19 scale. ECF No. 51 at 2, ¶ 2; ECF No. 57 at 2, ¶ 2. The salary at Step 1 of the
20 Associate Superintendent position was \$111,312 whereas the salary at Step 6 was

1 \$130,286. ECF No. 51 at 2, ¶ 3. On March 17, 2020, Dr. Irion contacted Plaintiff
2 by telephone regarding her job position title. ECF No. 51 at 3, ¶ 6. The parties
3 dispute the contents and implications of this conversation. Plaintiff alleges that Dr.
4 Irion told her that it would be better if Plaintiff were called “Assistant
5 Superintendent for Human Resources” so as not to upset Associate Superintendent
6 of Financial Services Scott Izutsu for “political reasons;” Plaintiff believed this
7 change in title was in appearance only. ECF No. 51 at 3, ¶¶ 6-8. Defendants assert
8 that Dr. Irion did not tell Plaintiff that he changed the position for political reasons;
9 rather, Dr. Irion changed Plaintiff’s position title to Step 6 of Assistant
10 Superintendent in order for Plaintiff to receive a higher compensation than Step 1
11 of Associate Superintendent. ECF No. 57 at 2-3, ¶¶ 2, 6. The salary at Step 6 of
12 the Associate Superintendent position was \$127,658. ECF No. 51 at 2, ¶ 3.

13 As Assistant Superintendent of Human Resources, Plaintiff was a member of
14 YSD’s Superintendent’s Group or “Cabinet.” ECF No. 51 at 5, ¶ 14. Mr. Izutsu,
15 as the Associate Superintendent of Financial Services, was also a member of the
16 Cabinet. ECF No. 46-3 at 1-5. Mr. Izutsu was initially hired with YSD as
17 Assistant Superintendent of Financial Services in 2002 before becoming Associate
18 Superintendent in 2013. ECF No. 46 at 4, ¶ 5 (citing ECF No. 46-3 at 1, ¶¶ 2-3).
19 While Plaintiff and Mr. Izutsu had different positions and duties, generally the
20 superintendent positions were “all connected” and job duties overlapped or were

1 similar in certain respects. *See* ECF No. 51 at 5-9, ¶¶ 14-24; ECF No. 57 at 3-4, ¶¶
2 14-24. However, in addition to overseeing Human Resources, Plaintiff, as a
3 licensed attorney, provided legal opinions, guidance, and interpretation even
4 though she was not legal counsel for YSD. ECF No. 51 at 11, ¶ 30.

5 In terms of salary, YSD paid Mr. Izutsu approximately \$30,000 more per
6 year than Plaintiff. ECF No. 51 at 12, ¶ 34. On June 30, 2017, Dr. Irion
7 recommended a 4% pay increase for Mr. Izutsu and a 3.7-3.8% pay increase for the
8 remaining female members of the Cabinet. ECF No. 51 at 12, ¶ 35. Ultimately,
9 for the 2017-2018 calendar year, YSD paid Mr. Izutsu \$197,383.00 and Plaintiff
10 \$163,565.00. ECF No. 51 at 12, ¶ 36.

11 **B. Plaintiff's Opposition to YSD Practices**

12 Between March 13, 2017 and November 6, 2017, Plaintiff alleges that she
13 opposed various illegal activities by the Defendants, acts that Dr. Irion directed or
14 sanctioned. ECF No. 51 at 14, ¶ 42. Plaintiff alleges an extensive list of activities
15 she opposed, which include: (1) Defendants' unequal treatment of employees
16 based on gender, (2) Defendants' failure to address sex/gender discrimination
17 against female YSD employees, (3) Defendants' discrimination against employees
18 based on their failure to conform to certain sex/gender stereotypes, (4) Defendants'
19 unequal treatment of employees and students based on race, (5) Defendants'
20 violation of RCW 41.56.140's prohibition on direct dealing, (6) Defendants' desire

1 to issue teaching contracts to those who did not hold effective teaching certificates
2 in violation of RCW 28A.405.210, (7) Defendants' failure to comply with federal
3 laws regarding employees and students with disabilities, (8) Defendants' failures to
4 comply with Title IX regarding student allegations of sexual harassment and
5 violence, (9) Dr. Irion's different treatment of employees and members of the
6 community based on religious affiliation, (10) Dr. Irion's failure to respond to
7 concerns regarding understaffing in the Human Resources Department, (11) YSD's
8 failure to exercise reasonable care in the supervision and protection of students in
9 its custody, (12) YSD's violations of the Open Public Meetings Act and the Public
10 Records Act; (13) YSD's violations of the Family Educational Records Privacy
11 Act, and (14) YSD's failure to enforce School Board Operational Procedures. ECF
12 No. 51 at 15-16, ¶¶ 43-44. Defendants admit that Plaintiff raised workplace
13 concerns consistent with her management duties, but otherwise deny Plaintiff's
14 allegations. ECF No. 57 at 6, ¶¶ 43-44.

15 Regarding the treatment of teacher and staff, Plaintiff fielded several
16 concerns from principals, assistant principals, and other employees who reported
17 workplace concerns regarding disparate treatment on the basis of gender, race, and
18 religion after which Plaintiff discussed such concerns with Dr. Irion and Ms.
19 Cecilia Mahre, YSD's Title IX Coordinator. *See generally* ECF No. 51 at 16-26,
20 ¶¶ 45-67. While generally objecting on the basis of relevance and hearsay,

1 Defendants specifically deny that Dr. Irion attempted to discipline a female
2 employee and tell the employee's husband about an alleged affair, that Plaintiff
3 told the Cabinet that she found a pattern of inappropriate behavior regarding a male
4 employee's conduct to female employees, that Plaintiff reported that there was a
5 pattern of YSD hiring male principals over female principals, that Dr. Irion
6 criticized female employees' attire, and that Plaintiff raised pay inequities based on
7 gender. ECF No. 57 at 6-7, ¶¶ 51, 53, 57-58, 60, 65. Defendants assert that "[a]ny
8 comments made by Plaintiff would have been consistent with her management
9 duties." ECF No. 57 at 7, ¶ 60.

10 Regarding students and parents, Plaintiff reported several concerns to Dr.
11 Irion that white students and families were favored over students and families of
12 color, including that YSD was not providing equal services to Spanish speaking
13 families. *See generally* ECF No. 51 at 26-29, ¶¶ 68-72. Defendants deny
14 Plaintiff's allegations. ECF No. 57 at 7-8, ¶¶ 68-72.

15 Regarding opposing YSD policies and practices, Plaintiff opposed and
16 reported concerns to Dr. Irion including concerns regarding Dr. Irion's system of
17 placing employees on the pay scale known as the "Jack Factors," perceived
18 violations of the Open Public Meetings Act, Title IX concerns, unprofessional
19 conduct of Steve McKenna, the President of the Yakima Education Association,
20 Dr. Irion's perceived direct dealing in attempting to hire an interim administrative

1 assistant, and the staffing of the Human Resources Department. *See generally*
2 ECF No. 51 at 29-37, ¶¶ 73-85. Specifically, Plaintiff alleges she made only one
3 statement to Dr. Irion to the effect of: “The Jack Factors are creating a spiral that is
4 causing the men to be paid more than women. We are going to keep paying men
5 more than women if we keep using these factors. This is gender-based pay
6 discrimination is going to cause the District liability. And I will not support it.”
7 ECF No. 51 at 30, ¶ 73(e). Plaintiff otherwise generally asserts that “she had
8 expressed [her] concerns about the Jack Factors to others, like Ms. Mahre.” ECF
9 No. 51 at 30, ¶ 73(d). As it relates to these alleged reports, Defendants generally
10 deny Plaintiff’s allegations, specifically asserting that Plaintiff did not tell Dr. Irion
11 that the “Jack Factors” discriminated due to gender, Plaintiff may have only
12 suggested training on the Open Public Meetings Act, Dr. Irion never told Plaintiff
13 to “stay in her lane” or “mind your own business,” Plaintiff did not “confront” Dr.
14 Irion, and that Plaintiff’s management duties included making suggestions for
15 improvement. ECF No. 57 at 8-11, ¶¶ 73-85.

16 Regarding teacher certificates, it is undisputed that YSD faced concerns
17 regarding teachers in classrooms whose certifications lapsed. ECF No. 51 at 37-
18 38, ¶¶ 86. Dr. Irion wanted children to have consistent teachers throughout the
19 school year. ECF No. 51 at 38, ¶ 87. To avoid issuing teaching contracts to
20 teachers whose certifications lapsed, Plaintiff sought legal advice from an attorney

1 who proposed that YSD issue personal services contracts to teachers with lapsed
2 certificates to be present in the classroom with a certificated substitute. ECF No.
3 51 at 38, ¶ 87. Dr. Irion asked Plaintiff to confer with a second attorney to confirm
4 this advice. ECF No. 51 at 38, ¶ 87. Plaintiff conferred with a second attorney
5 who agreed with the advice except that on the point of whether YSD would have to
6 self-report the practice to OPP. ECF No. 51 at 38, ¶ 87.

7 Dr. Irion stated there “may have been” other instances where Plaintiff told
8 him that YSD was violating the law. ECF No. 51 at 42, ¶ 91.

9 **C. Plaintiff Placed on Administrative Leave**

10 On October 30, 2017 and November 6, 2017, Dr. Irion asked Plaintiff if the
11 attorneys’ advice on issuing personal services contracts to teachers with lapsed
12 certificates was legal. ECF No. 51 at 38, ¶ 87. At the November 6, 2017, Cabinet
13 meeting, Plaintiff raised the lapsed teacher certificate issue but would not say
14 whether the practice was legal. ECF No. 57 at 11-12, ¶ 86. After the meeting, Dr.
15 Irion repeatedly asked Plaintiff whether the practice was legal but Plaintiff refused
16 to provide a definitive answer. ECF No. 51 at 38, ¶ 87; ECF No. 57 at 11-12, ¶¶
17 86, 89. As a result of this conversation, Dr. Irion placed Plaintiff on paid
18 administrative leave citing her insubordination for failing to give an answer on
19 whether YSD’s practices were legal. ECF No. 51 at 38, ¶ 87. Dr. Irion “needed to
20 have absolute trust of members of Cabinet.” ECF No. 57 at 13, ¶ 89.

1 Plaintiff asserts that Dr. Irion provided an additional justification for placing
2 her on administrative leave: Plaintiff would correct Dr. Irion or field questions
3 from the School Board that Dr. Irion “believed made him look bad.” ECF No. 51
4 at 42, ¶ 92. Defendants deny this allegation. ECF No. 57 at 13, ¶ 92. However,
5 Dr. Irion had concerns regarding Plaintiff’s performance, including “her approach
6 and how she was conducting business ... [i]t was really stirred up in the
7 District....” ECF No. 51 at 51-52, ¶¶ 129-130.

8 Between 2007 and 2018, YSD used a progressive discipline process in order
9 to determine whether to investigate an employee for allegations of dishonesty.
10 ECF No. 51 at 43, ¶ 94. Plaintiff asserts that this process applies to all employees.
11 ECF No. 51 at 43, ¶ 96. However, Defendants assert that the progressive
12 discipline system did not apply to Plaintiff because the system does not apply to
13 members of the Cabinet unless expressly provided in the Cabinet employee’s
14 contract. ECF No. 57 at 14, ¶ 93. Plaintiff was placed on administrative leave
15 without progressive discipline. ECF No. 51 at 43, ¶ 96.

16 Plaintiff identified other YSD employees who were charged with dishonesty
17 or insubordination who were not fired or otherwise disciplined. ECF No. 51 at 45-
18 51, ¶¶ 99-112. Defendants object that Plaintiff’s identified employees were not
19 members of the Cabinet. ECF No. 57 at 14-15, ¶¶ 101-103, 106, 112.

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D. Plaintiff's Family Medical Leave Act Leave

On March 15, 2018, Plaintiff notified YSD that she needed workplace leave and attached a physician's note that was dated March 14, 2018. ECF No. 51 at 59, ¶ 163. YSD did not provide Plaintiff FMLA Eligibility Notice within five business days. ECF No. 51 at 60, ¶ 164.

On March 26, 2018, Plaintiff emailed YSD requesting FMLA and attached doctor notes dated for March 14, 2018 and March 22, 2018. ECF No. 51 at 60, ¶ 165. In this email, Plaintiff requested "what work calendar date ... you project will be my last day of having accrued leave available and then what work calendar date you project that I will exhaust FMLA." ECF No. 51 at 60, ¶ 166. YSD did provide Plaintiff FMLA Eligibility Notice within five business days but provided the same on April 3, 2018. ECF No. 51 at 60, ¶ 167; ECF No. 57 at 21, ¶ 167.

On April 3, 2018, YSD emailed Plaintiff and informed Plaintiff among other things that she was eligible for FMLA and Plaintiff had seven days to return the FMLA medical certification form. ECF No. 51 at 60-61, ¶ 168. On April 4, 2018, Plaintiff emailed YSD and informed them of technical FMLA violations. ECF No. 51 at 61-62, ¶ 171.

On April 17, 2018, Plaintiff emailed YSD that the failure to provide information regarding when her accrued and FMLA hours would expire was causing her harm. ECF No. 51 at 61-62, ¶ 171. That same day, YSD informed

1 Plaintiff (1) that her medical leave commenced on March 27, 2018, (2) that she had
2 55.75 days of sick leave, 27.5 days of vacation, and 2 days of personal leave, and
3 (3) that her leave balances would be exhausted on July 25, 2018. ECF No. 56 at 5.
4 Plaintiff alleges that YSD caused \$30,000 in damages related to her taking accrued
5 leave. ECF No. 51 at 61-62, ¶ 171.

6 **E. Plaintiff's Contract is Not Renewed**

7 In March 2018, YSD paid the Cabinet, except for Plaintiff, retroactive pay
8 increases for the 2017-2018 school year after Dr. Irion proposed the increase to the
9 School Board. ECF No. 51 at 56-57, ¶¶ 151-156. Plaintiff received her pay
10 increase in full in June 2018 after ongoing settlement negotiations broke down.
11 ECF No. 51 at 57, ¶ 155; ECF No. 53-2 at 71.

12 Dr. Irion learned that Plaintiff made an alleged misrepresentation in her
13 employment application that stated she had never resigned in lieu of termination.
14 ECF No. 51 at 55-56, ¶¶ 147-149. Plaintiff asserts she voluntarily resigned from
15 the Tacoma School District in September 2016 due to her father's ongoing health
16 care requirements. ECF No. 51 at 2-3, ¶¶ 4-5. Defendants assert that Plaintiff
17 resigned in lieu of termination based on a severance agreement with the Tacoma
18 School District. ECF No. 57 at 2, ¶ 5; ECF No. 46-6 at 26, ¶ 144.

19 On April 12, 2018, while Plaintiff was on FMLA leave, YSD sent Plaintiff a
20 *Loudermill* notice for a disciplinary hearing set for the following week regarding

1 the alleged resignation in lieu of termination issue. ECF No. 51 at 62, ¶¶ 172-173.
2 Plaintiff offered alternative dates but Defendant never rescheduled: no *Loudermill*
3 hearing occurred. ECF No. 51 at 62, ¶ 174. Defendants assert a *Loudermill*
4 hearing was not required under Plaintiff's employment contract. ECF No. 57 at
5 21, ¶ 172. Plaintiff's one-year contract was not renewed. ECF No. 46 at 16, ¶ 36.
6 Plaintiff filed numerous public records requests with YSD. ECF No. 51 at
7 62, ¶ 175. YSD has not responded to and/or administratively closed some of
8 Plaintiff's requests. ECF No. 51 at 62-63, ¶¶ 175-178.

9 DISCUSSION

10 A. Summary Judgment Standard

11 The Court may grant summary judgment in favor of a moving party who
12 demonstrates "that there is no genuine dispute as to any material fact and that the
13 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling
14 on a motion for summary judgment, the court must only consider admissible
15 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The
16 party moving for summary judgment bears the initial burden of showing the
17 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
18 317, 323 (1986). The burden then shifts to the non-moving party to identify
19 specific facts showing there is a genuine issue of material fact. *See Anderson v.*
20 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "The mere existence of a scintilla

1 of evidence in support of the plaintiff's position will be insufficient; there must be
2 evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

3 For purposes of summary judgment, a fact is "material" if it might affect the
4 outcome of the suit under the governing law. *Id.* at 248. Further, a material fact is
5 "genuine" only where the evidence is such that a reasonable jury could find in
6 favor of the non-moving party. *Id.* The Court views the facts, and all rational
7 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*
8 *Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted
9 "against a party who fails to make a showing sufficient to establish the existence of
10 an element essential to that party's case, and on which that party will bear the
11 burden of proof at trial." *Celotex*, 477 U.S. at 322.

12 **B. *Monell* Liability**

13 Defendants move for summary judgment on Plaintiff's § 1983 claims on the
14 grounds that Defendant YSD is shielded from *Monell* liability because Plaintiff
15 failed to allege that her constitutional rights were violated due to an official policy
16 and the Defendant Superintendent Dr. Irion was not a final policymaker. ECF No.
17 45 at 5-9. However, Plaintiff asserts she never alleged *Monell* liability and that all
18 Constitutional claims are against Defendant Dr. Irion only. ECF No. 50 at 35.
19 Therefore, summary judgment on this claim, if any, is appropriate.

20 //

1 **C. Section 1983, First Amendment**

2 Defendants move for summary judgment on Plaintiff's First Amendment
3 claim for retaliation on the grounds that Plaintiff's speech was made in the course
4 of her employment as a public employee, Plaintiff lacks evidence that Defendants
5 were aware Plaintiff was involved in protected speech, Plaintiff lacks evidence of
6 discrimination by Defendants under Title IX, the ADA, and the Rehabilitation Act,
7 Plaintiff lacks evidence her speech was a substantial motivating factor for
8 Defendants' actions, and Defendants would have reached the same decision even if
9 Plaintiff had not been involved in protected speech. ECF No. 45 at 26-32.
10 Plaintiff argues she spoke on matters of public concern as a private citizen for
11 which was the motivating factor in her adverse employment action. ECF No. 50 at
12 24-29. As the issue of whether Plaintiff's speech was protected while made in her
13 official capacity is dispositive, the Court does not address the remaining
14 arguments.

15 "[A] governmental employer may impose certain restraints on the speech of
16 its employees, restraints that would be unconstitutional if applied to the general
17 public." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004). To determine whether
18 a public employee has alleged a violation of her First Amendment rights as a result
19 of retaliation for her speech, courts consider whether (1) the plaintiff spoke on a
20 matter of public concern; (2) the plaintiff spoke as a private citizen or public

1 employee; (3) the plaintiff's protected speech was a substantial or motivating
2 factor in the adverse employment action; (4) the state had an adequate justification
3 for treating the employee differently from other members of the general public;
4 and (5) the state would have taken the adverse employment action even absent the
5 protected speech. *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1103 (9th
6 Cir. 2011). The plaintiff bears the burden of proof on the first three areas of
7 inquiry, but the burden shifts to the government to prove the last two. *Id.* "[F]or
8 purposes of a First-Amendment retaliation claim, being placed on involuntary paid
9 leave can *itself* be an adverse employment action." *Campbell v. Hawaii Dep't of*
10 *Educ.*, 892 F.3d 1005, 1016 (9th Cir. 2018); *Dahlia v. Rodriguez*, 735 F.3d 1060,
11 1078 (9th Cir. 2013); *see also Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 822
12 (9th Cir. 2017) (accepting coach's placement on paid administrative leave as an
13 adverse employment action).

14 Defendants argue Plaintiff's speech was made in her capacity as a public
15 employee. ECF No. 45 at 28. "[W]hen public employees make statements
16 pursuant to their official duties, those statements do not receive First Amendment
17 protection." *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007) (citing
18 *Garcetti v. Ceballos*, 547 U.S. 410, 414-17 (2006)). "[T]he determination whether
19 the speech in question was spoken as a public employee or a private citizen
20 presents a mixed question of fact and law." *Posey v. Lake Pend Oreille Sch. Dist.*

1 *No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). “First, a factual determination must
2 be made as to the ‘scope and content of a plaintiff’s job responsibilities.’” *Johnson*
3 *v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011) (citing *Eng. v.*
4 *Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009)). This inquiry should rely on
5 practical considerations rather than mechanical reliance on formal or written job
6 descriptions. *Id.* Relevant factors to consider include whether the employee
7 communicated with individuals outside her chain of command, whether the
8 communication was a routine report within typical job duties or broad concerns
9 about corruption or systemic abuse, and whether the employee speaks in
10 contravention to a supervisor’s orders. *Dahlia*, 735 F.3d at 1074-75. “Second, the
11 ‘ultimate constitutional significance’ of those facts must be determined as a matter
12 of law.” *Johnson*, 658 F.3d at 966 (citing *Eng*, 552 F.3d at 1071). The plaintiff
13 bears the burden of showing she spoke in the capacity of a private citizen and not a
14 public employee. *Eng*, 552 F.3d at 1071.

15 Particularly instructive on this issue is *Hagen v. City of Eugene*, 736 F.3d
16 1251 (9th Cir. 2013), where K-9 Officer Hagen expressed his concerns about
17 officer safety to coworkers and others within the chain of command at the Eugene
18 Police Department. The evidence at trial established that his concerns were
19 directed to his coworkers and his superior officers. *Id.* at 1258. In reversing the
20 jury’s verdict in his favor, the Ninth Circuit held that the defendants were entitled

1 to judgment as a matter of law because “Hagen raised his concerns about his and
2 his fellow officers’ job safety internally and within the chain of command [which]
3 cements our conclusion that his comments were made as a public employee, and
4 not as a private citizen.” *Id.* at 1259.

5 Here, Defendants argue Plaintiff made her alleged oppositional comments
6 within the scope of her job responsibilities because her job included monitoring
7 YSD’s compliance with state and federal employment laws and regulations. ECF
8 No. 45 at 29; *see also* ECF No. 46-1 at 25-26; ECF No. 51 at 43, ¶ 93. Plaintiff’s
9 arguments that she spoke as a private citizen are inconsistent with, if not
10 contradicted by, the record. ECF No. 50 at 27. Plaintiff attempts to isolate her role
11 as Superintendent of Human Resources to addressing only staff, not student, issues
12 so that any statements regarding student issues were taken outside the scope of her
13 job responsibilities. *Id.* However, Plaintiff’s job description includes the primary
14 functions of promoting “the overall efficiency of the school system” and
15 maximizing “education opportunities for students.” ECF No. 46-1 at 25-26. As
16 the Superintendent of Human Resources, Plaintiff was tasked with reviewing and
17 interpreting applicable state and federal employment laws and regulations and
18 monitoring such compliance as well as coordinating, establishing, and maintaining
19 sound salary and wage administration practices. *Id.* Plaintiff advised YSD on
20 federal law compliance, including student issues. ECF No. 51 at 11, ¶¶ 29-32.

1 Any legal advice that Plaintiff provided, even if outside her technical job
2 description, was taken within the scope of her employment. *See, e.g.*, ECF No. 51
3 at 11, ¶ 30 (“I could access her for legal opinions, guidance, interpretation” even
4 though Plaintiff was not the “attorney by title in our district.”); ECF No. 57 at 9, ¶
5 79 (“[S]he has a wealth of knowledge about a variety of topics, and though
6 something might not be a part of her assignment at times would provide support to
7 staff because of her expertise.”).

8 Moreover, Plaintiff’s speech was made internally to her supervisor Dr. Irion
9 and co-worker Ms. Mahre, the Title IX compliance officer, regarding issues
10 concerning federal laws like Title IX for which the Dr. Irion and Ms. Mahre were
11 responsible. ECF No. 50 at 27. Plaintiff’s claim that Dr. Irion told her to “stay in
12 her lane,” which Defendants deny (ECF No. 57 at 8, ¶ 75), is not dispositive. ECF
13 No. 50 at 27. Construing this evidence in light most favorable to Plaintiff, no jury
14 could reasonably conclude that Plaintiff’s speech was made outside the scope of
15 her job responsibilities. Plaintiff’s speech is akin to *Hagen*, where the employee
16 became aware of an issue in the scope of his employment and proceeded to report
17 concerns about workplace issues to supervisors and coworkers. *See Hagan*, 736
18 F.3d at 1258-59. Because Plaintiff did not engage in protected speech, Defendants
19 are entitled to summary judgment on this claim.

20 //

1 **D. Section 1983, Procedural Due Process**

2 Defendants move for summary judgment on Plaintiff's procedural due
3 process claim on the grounds that Plaintiff was not a certificated administrator, was
4 not terminated from employment, and lacked a property interest in continued
5 employment. ECF No. 45 at 11; ECF No. 45 at 32-34. Plaintiff asserts she was a
6 certificated administrator and Defendants' failure to provide her with procedural
7 due process deprived her of the property interest in renewed employment. ECF
8 No. 50 at 29-30.

9 The Fourteenth Amendment protects against deprivation of life, liberty, or
10 property without due process of law. *Ingraham v. Wright*, 430 U.S. 651, 672
11 (1977). Courts analyze procedural due process claims in two steps. First, the court
12 asks whether there was deprivation of a constitutionally protected liberty or
13 property interest. *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002). If the
14 court finds a protected interest, it proceeds to step two to determine if there was a
15 denial of adequate procedural protections. *Id.*

16 The Fourteenth Amendment protects the property interest an individual "has
17 already acquired." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576
18 (1972). In order to assert a property interest for a procedural due process claim, a
19 person must "have a legitimate claim of entitlement" to the protected interest.
20 *Town of Castle Rock, Colo. v. Gonzalez*, 545 U.S. 748, 756 (2005). "Property

1 interests are not created by the Constitution, ‘they are created and their dimensions
2 are defined by existing rules or understandings that stem from an independent
3 source such as state law.’” *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 538
4 (1985) (citing *Roth*, 408 U.S. at 577). A statute that requires an employer to
5 provide a specified reason for an adverse employment action creates a protected
6 property interest for the employee. *Sanchez v. City of Santa Ana*, 915 F.2d 424,
7 428-29 (9th Cir. 1990); *see also Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927,
8 931-32 (9th Cir. 2017) (Washington statute requiring adverse change in school
9 principal contract status to be supported by probable cause gave rise to
10 constitutionally protected property interest).

11 Here, the parties dispute whether Plaintiff was a certificated administrator
12 for the purposes of RCW 28A.405.310 and RCW 28A.405.300. ECF No. 45 at 10-
13 11; ECF No. 50 at 29-30. It is undisputed that Plaintiff did not hold a school
14 administrator certificate. ECF No. 46-1 at 4, ¶ 9.² Plaintiff asserts that she is a
15 certificated administrator because they reported her as one to OSPI. ECF No. 50 at
16 29. However, Plaintiff does not dispute that YSD is required to submit “S-275”
17 forms for each employee to OSPI which does not have a non-certificated

18
19 ² Assistant superintendents are not required to hold professional certificates.
20 *See* RCW 28A.410.120.

1 administrator category. ECF No. 46-1 at 4, ¶ 9. Assistant superintendents are
2 reported in the “S-275” form as “certificated” for the purpose of the electronic
3 personnel reporting process submitted to OSPI. *Id.*; *see also* Wash. Admin. Code
4 392-121-200 (“As used *in this chapter*,” assistant superintendent means
5 certificated employee) (emphasis added).

6 Plaintiff also argues she is a certificated employee because otherwise “YSD
7 would not have sent [Plaintiff] a *Loudermill* notice. ECF No. 50 at 29. Defendants
8 assert *Loudermill* hearings may be provided as a best practice even if an employee
9 does not have a protected property interest. ECF No. 55 at 8. Plaintiff does not
10 provide any authority, and the Court finds none, that provides that receipt of a
11 *Loudermill* notice makes an employee certificated. As such, Plaintiff was not a
12 certificated employee.

13 As an employee without a professional certificate on a one-year contract,
14 Plaintiff was not entitled to the state statutory protections set forth in RCW
15 28A.405 *et seq.* ECF No. 45 at 33. Plaintiff did not have a right to challenge the
16 nonrenewal of her contract. It is undisputed that Plaintiff was paid in full under
17 her contract. ECF No. 50 at 31. Even construing the evidence in the light most
18 favorable to Plaintiff, there is no genuine issue of fact that Plaintiff was not a
19 certificated employee, was not terminated from her position, and was provided all
20 benefits due under her one-year contract. Accordingly, Plaintiff cannot claim her

1 due process rights were violated based on a statute governing the procedures by
2 which a certificated employee may be terminated. Defendants are entitled to
3 summary judgment on this claim.

4 **E. Qualified Immunity**

5 Defendants move for summary judgment on Plaintiff's § 1983 claims on the
6 grounds that Defendant Dr. Irion is entitled to qualified immunity liability as to the
7 alleged violations of the First and Fourteenth Amendments. ECF No. 45 at 9-11.
8 As described *supra*, there are no constitutional violations. As such, the qualified
9 immunity defense is moot.

10 **F. Family and Medical Leave Act**

11 Defendants move for summary judgment on Plaintiff's Family and Medical
12 Leave Act ("FMLA") claims based on interference and discrimination/retaliation.
13 ECF No. 45 at 11-18.

14 *1. Interference*

15 Defendants move for summary judgment on Plaintiff's FMLA interference
16 claim on the grounds that Plaintiff lacks evidence of prejudice and proof of a
17 serious health condition. ECF No. 45 at 13-15. Plaintiff argues that she
18 establishes prejudice and a serious health condition. ECF No. 50 at 8-9.

19 The FMLA prohibits an employer from making an adverse employment
20 action as a result of an employee taking FMLA leave. 29 U.S.C. § 2615(a)(1).

1 This prohibition is designed to remove a potential obstacle to an employee taking
2 FMLA leave, as “[e]mployees are, understandably, less likely to exercise their
3 FMLA leave rights if they can expect to be fired or otherwise disciplined for doing
4 so.” *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001).
5 Employers who violate this prohibition are liable for “interfering” with the exercise
6 of FMLA rights within the meaning of § 2615(a)(1). *Id.* To establish a *prima*
7 *facie* case of FMLA interference, an employee must establish that (1) she was
8 eligible for FMLA protection, (2) the employer was covered by the FMLA, (3) she
9 was entitled to leave under the FMLA, (4) she provided sufficient notice of her
10 intent to take leave, and (5) the employer denied FMLA benefits to which she was
11 entitled. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir.
12 2014).

13 For purposes of this motion, Defendants do not dispute that Plaintiff was a
14 FMLA-eligible employee, YSD is a FMLA-covered employer, or that Plaintiff
15 provided sufficient notice to take leave. Defendants place two elements at issue:
16 whether Plaintiff was entitled to leave under the FMLA and whether YSD denied
17 Plaintiff’s FMLA benefits to which she was entitled. ECF No. 45 at 13-15. The
18 Court addresses each issue in turn.

19 //

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1 a. FMLA Entitlement: Serious Health Condition

2 The FMLA entitles an eligible employee to 12 workweeks of leave during
3 any 12-month period due to a serious health condition that renders the employee
4 unable to perform the functions of their job. 29 U.S.C. § 2612(a)(1)(D). A serious
5 health condition is “an illness, injury, impairment, or physical or mental condition
6 that involves (A) inpatient care in a hospital, hospice, or residential medical care
7 facility; or (B) continuing treatment by a health care provider.” 29 U.S.C.
8 § 2611(11). Department of Labor regulations provide that “continuing treatment”
9 entails a “period of incapacity of more than three consecutive, full calendar days,
10 and any subsequent treatment or period of incapacity relating to the same
11 condition, that also involves” either (a) treatment two or more times by a health
12 care provider within thirty days of the first day of incapacity, unless extenuating
13 circumstances exist, or (b) treatment by a health care provider on at least one
14 occasion resulting in a regimen of continuing treatment under that provider’s
15 supervision. 29 C.F.R. § 825.115(a)(1)-(2).

16 Here, Plaintiff alleges that she provided YSD with two doctors’ notes on
17 March 26, 2018 that demonstrated Plaintiff had a serious health condition. ECF
18 No. 52 at 29, ¶ 56. On April 13, 2018, Plaintiff’s clinical psychologist sent the
19 Certification of Health Care Provider for Employee’s Serious Health Condition
20 that stated Plaintiff would be incapacitated from March 27, 2018 to July 13, 2018

1 due to anxiety, difficulties modulating effect, concentration, and daytime
2 drowsiness that would require continuing treatment once per week. ECF No. 50 at
3 9. Viewed in light most favorable to Plaintiff, these physician letters create a
4 genuine issue of material fact as to whether Plaintiff had a serious health condition
5 that made her unable to perform the functions of her job. *See* 26 U.S.C.
6 § 2612(a)(1)(D). Therefore, summary judgment on Defendants’ claim that
7 Plaintiff did not have a serious health condition is inappropriate.

8 b. FMLA Interference

9 “Employers have a duty to inform employees of their entitlements under the
10 FMLA.” *Olson v. United States by & through Dep’t of Energy*, 980 F.3d 1334,
11 1338 (9th Cir. 2020) (citing *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1134-35 (9th
12 Cir. 2003)); *see also* 29 C.F.R. § 825.300(d)-(e). The failure to provide notice
13 does not alone create a cause of action. *Id.* The FMLA “provides no relief unless
14 the employee has been prejudiced by the violation.” *Ragsdale v. Wolverine World*
15 *Wide, Inc.*, 535 U.S. 81, 89 (2002). There is no prejudice where the employee does
16 not suffer harm and receives all leave requested from the employer. *See Crawford*
17 *v. JP Morgan Chase NA*, 983 F. Supp. 2d 1264, 1271 (W.D. Wash. 2013).

18 Here, Plaintiff argues she was prejudiced: “Since YSD did not tell [Plaintiff]
19 when her accrued paid leave would end [Plaintiff] had to exhaust her paid leave
20 which, in turn, caused [Plaintiff] \$30,600.00 because of the exhaustion of her own

1 accrued leave when she sought to take FMLA.” ECF No. 50 at 8-9. YSD allows
2 sequential use of accrued and FMLA leave, but requires employees to first exhaust
3 accrued leave. ECF No. 52-12 at 2; ECF No. 55 at 2. On April 17, 2018, Plaintiff
4 emailed YSD and stated the hours of accrued leave she had but stated she was
5 unable to calculate when these accrued hours would expire. ECF No. 52-11 at 2-3.
6 That same day, YSD informed Plaintiff (1) that her medical leave commenced on
7 March 27, 2018, (2) that she had 55.75 days of sick leave, 27.5 days of vacation,
8 and 2 days of personal leave, and (3) that her leave balances would be exhausted
9 on July 25, 2018. ECF No. 56 at 5. Therefore, contrary to Plaintiff’s assertion,
10 YSD provided Plaintiff notice for when her accrued leave would expire, accrued
11 leave of which was required to be used prior to the sequential use of FMLA leave.
12 *See* ECF No. 52-11 at 2 (“The FMLA Application identifies that the District
13 requires employees to first exhaust accrued leave prior to accessing FMLA); ECF
14 No. 52-12 at 2 (“I am aware that I must exhaust annual, sick and compensatory
15 leave before going on leave without pay for FMLA leave.”).

16 Notwithstanding any technical violations of the FMLA, Plaintiff cannot
17 show that she was prejudiced nor that Defendant YSD denied her any leave. It is
18 unclear how Plaintiff suffered a \$30,600.00 loss of accrued leave when such leave
19 was required to be used before her FMLA leave. Taking the evidence in light most
20 favorable to Plaintiff, there is no genuine issue of material fact as to whether

1 Plaintiff suffered prejudice – she did not. Therefore, summary judgment on
2 Plaintiff’s FMLA interference claim is appropriate.

3 2. *Retaliation*

4 Defendants move for summary judgment on Plaintiff’s FMLA
5 discrimination/retaliation claim on the grounds that it should be analyzed as an
6 interference claim, Plaintiff did not engage in protected activity, and Plaintiff did
7 not suffer an adverse employment action. ECF No. 45 at 15-18. Plaintiff argues
8 she engaged in a protected activity by taking FMLA leave and can establish
9 causation and an adverse employment action. ECF No. 50 at 10-13.

10 a. Interference v. Retaliation

11 The FMLA has anti-retaliation and anti-discrimination provisions that
12 prohibit “discriminat[ion] against any individual for opposing any practice made
13 unlawful by this subchapter” and prohibit discrimination against any individual for
14 instituting or participating in FMLA proceedings or inquiries, respectively. 29
15 U.S.C. § 2615(a)(2)-(b). The anti-retaliation and anti-discrimination provisions do
16 not cover negative consequences imposed on an employee because she used
17 FMLA leave; such conduct is covered by the § 2615(a)(1) interference provision.
18 *See Bachelder*, 259 F.3d at 1124. The claim for discrimination or retaliation is
19 triggered only when “an employee is punished for *opposing* unlawful practices by
20 the employer.” *Xin Liu*, 347 F.3d at 1136.

1 Defendants argue that Plaintiff's retaliation claim should be analyzed as an
2 interference claim because "Plaintiff does not allege that Defendants discriminated
3 against her because she opposed Defendants' unlawful violations of the FMLA or
4 that she was fired for opposing Defendants' alleged violations of the FMLA."
5 ECF No. 45 at 16.³ In response, Plaintiff argues that she opposed YSD under
6 § 2615(a)(2) "by telling YSD that it was in violation of numerous FMLA
7 regulations." ECF No. 50 at 10. To the extent that Plaintiff informed YSD about
8 technical FMLA violations, Plaintiff raised opposition to YSD's practices. *See,*
9 *e.g.*, ECF No. 52-6. As such, the claim is properly analyzed as a retaliation claim
10 rather than an interference claim.

11 b. Retaliation

12 Under § 2615(a)(2), it is "unlawful for any employer to discharge or in any
13 other manner discriminate against any individual for opposing any practice made
14 unlawful by this subchapter." 29 U.S.C. § 2615(a)(2). A claim for a violation
15 under this provision is known as a discrimination or retaliation claim. *Sanders v.*
16 *City of Newport*, 657 F.3d 772, 777 (9th Cir. 2011). While not expressly adopted
17

18 ³ Defendants argue that the retaliation claim should be analyzed as an
19 interference claim but proceed to analyze the claim under a retaliation framework.
20 ECF No. 45 at 16-18.

1 by the Ninth Circuit, *see Bachelder*, 259 F.3d at 1125, district courts within the
2 Ninth Circuit have applied the *McDonnell Douglas* framework for § 2615(a)(2)
3 claims. *Crawford v. JP Morgan Chase NA*, 983 F. Supp. 2d 1264, 1269 (W.D.
4 Wash. 2013). The parties apply the *McDonnell Douglas* framework. ECF No. 45
5 at 16; ECF No. 50 at 10-13.

6 To establish a *prima facie* case of retaliation, a plaintiff must show that (1)
7 she availed herself of a protected right under the FMLA; (2) she was adversely
8 affected by an employment decision; and (3) there is a causal connection between
9 the two actions.” *Crawford*, 983 F. Supp. 2d at 1269. If a *prima facie* case is
10 established, the burden shifts to the employer to articulate a legitimate
11 nondiscriminatory reason for the adverse action. *Id.* If the employer satisfies that
12 standard, the burden shifts back to the plaintiff to show pretext. *Id.*

13 i. Protected Right

14 To establish that Plaintiff exercised a protected FMLA right, Plaintiff argues
15 that taking FMLA is a protected right under 29 U.S.C. § 2615 (a)(1) and that she
16 told YSD that it violated numerous FMLA regulations, implicating 29 U.S.C.
17 § 2615(a)(2). ECF No. 50 at 10. Defendants argue that, as a manager, Plaintiff’s
18 reports of YSD violations were not sufficiently clear and detailed for YSD to
19
20

1 understand that Plaintiff was asserting a protected right. ECF No. 55 at 3.⁴ After
2 Plaintiff filed for FMLA, Plaintiff's letter to YSD unambiguously opposed
3 Defendants' actions that allegedly violated Plaintiff's FMLA rights, including her
4 right to various FMLA notices, information, and time to return a health care
5 provider certification. *See* ECF No. 52-6 at 2-3. Therefore, the first *prima facie*
6 element is satisfied.

7 ii. Adverse Employment Action

8 To establish an adverse employment action, Plaintiff argues that YSD
9 instituted a *Loudermill* hearing and withheld retroactive wages. ECF No. 50 at 12-
10 13. An employment action is adverse if it is reasonably likely to deter employees
11 from engaging in protected activity. *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th
12 Cir. 2000).

15 ⁴ Defendant relies on the so-called "manager rule" or "fair notice" rule under
16 the Fair Labor Standards Act. *Rosenfield v. GlobalTranz Enterprises, Inc.*, 811
17 F.3d 282, 284 (9th Cir. 2015). In the event this rule applies to the FMLA, Plaintiff
18 opposed technical violations not as a manager with policy concerns but as an
19 employee seeking personal FMLA leave in a manner sufficiently clear and detailed
20 for YSD to understand she was doing so. *Id.* at 286.

1 As to the *Loudermill* notice, Plaintiff relies on *Poland v. Chertoff*, 494 F.3d
2 1174, 1180 (9th Cir. 2007) to state that initiating an administrative inquiry
3 constitutes an adverse employment action. ECF No. 50 at 12. The Ninth Circuit
4 recognizes that administrative inquiries in the form of an investigation may
5 constitute an adverse employment action. *Lakeside-Scott v. Multnomah Cty.*, 556
6 F.3d 797, 803 (9th Cir. 2009) (“[W]e have suggested an investigation of an
7 employee [as in *Poland*] might so qualify.”). Here, the mere issuance of a
8 *Loudermill* notice does not rise to the level of such an administrative inquiry. A
9 *Loudermill* notice is a required component of the pre-termination process for the
10 employee’s benefit; the notice helps ensure that the employee’s property and
11 liberty interests are adequately protected. *Matthews v. Harney Cnty. Sch. Dist. No.*
12 *4*, 819 F.2d 889, 892 (9th Cir. 1987). No *Loudermill* hearing occurred, and as
13 discussed *infra*, no *Loudermill* hearing was required because Plaintiff is not a
14 certificated administrator. Therefore, the *Loudermill* notice itself does not
15 constitute an adverse employment action.

16 As to the withholding of wages, Plaintiff alleges that YSD withheld
17 retroactive wages from a pay increase on July 1, 2017 for over two months but
18 provided members of the Cabinet the same wages on March 30, 2018. ECF No. 50
19 at 13; ECF No. 46-1 at 14, ¶ 33. The Court finds that withholding wages for over
20 two months when paid out to other employees constitutes an adverse employment

1 action as such conduct is reasonably likely to deter someone from engaging in
2 protected activity. *See, e.g., United States v. Hawaii*, No. CV 14-00214 JMS-RLP,
3 2015 WL 5063956, at *14 (D. Haw. Aug. 26, 2015) (“The court has no difficulty
4 finding that withholding an employee’s wages for weeks and/or months would
5 reasonably likely deter someone from engaging in protected activity.”). Therefore,
6 the second *prima facie* element is satisfied.

7 iii. Causation

8 To establish causation, Plaintiff first argues that YSD instituted the
9 *Loudermill* hearing in April 2018 while Plaintiff was on leave for conduct that
10 occurred in August 2017. ECF No. 50 at 10. Second, Plaintiff argues that YSD
11 gave conflicting reason for “firing” Plaintiff. ECF No. 50 at 11. Third, Plaintiff
12 asserts the retroactive wages were paid to other members of the Cabinet but not
13 Plaintiff within four days of the FMLA request. ECF No. 50 at 13.

14 Here, Plaintiff’s protected activity under the anti-retaliation provision
15 occurred on April 4, 2018 when she sent the letter opposing YSD’s technical
16 FMLA violations. ECF No. 52-6 at 2. The adverse employment action occurred
17 before that, as Plaintiff was not paid retroactive wages that were given to other
18 employees on March 30, 2018. ECF No. 46-1 at 14, ¶ 33. Plaintiff’s argument
19 that YSD gave conflicting reasons for wanting to terminate Plaintiff, even if
20 accepted as true, is not sufficient to establish causation as the *Loudermill* notice did

1 not constitute an adverse employment action. Therefore, as Plaintiff cannot
2 establish causation, she cannot make a *prima facie* case for retaliation.

3 Where Plaintiff cannot demonstrate prejudice on her interference claim nor
4 can she set out a *prima facie* case for retaliation, summary judgment is appropriate
5 on Plaintiff's FMLA claims.

6 **G. Washington State Wage Rebate Act**

7 Defendants move for summary judgment on Plaintiff's claim under the
8 Washington Wage Rebate Act ("WRA") on the grounds that Plaintiff is not
9 entitled to double damages, interest, or attorney fees and Plaintiff lacks evidence of
10 an intent by the District to pay Plaintiff less than what she was entitled to receive.
11 ECF No. 45 at 18-19. Plaintiff argues that there are issues of fact as to whether
12 Defendants acted willfully that a jury should decide. ECF No. 50 at 13-14.

13 The Washington Legislature passed the WRA in 1939 "to protect
14 the *wages* of an employee against any diminution or deduction therefrom
15 by rebating, underpayment, or false showing of overpayment of any part of
16 such wages." *LaCoursiere v. Camwest Dev., Inc.*, 181 Wash. 2d 734, 741 (2014)
17 (quoting *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152 (1998)). To this end,
18 RCW 49.52.050 provides:

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1 Any employer or officer, vice principal or agent of any employer, whether
said employer be in private business or an elected public official, who . . .

2 (2) Wilfully and with intent to deprive the employee of any part of his or her
wages, shall pay any employee a lower wage than the wage such employer is
3 obligated to pay such employee by any statute, ordinance, or contract[.]

4 Such actors are also subject to civil liability “for twice the amount of the wages
5 unlawfully rebated or withheld by way of exemplary damages, together with costs
6 of suit and a reasonable sum for attorney’s fees.” RCW 49.52.070. “Under RCW
7 49.52.050(2), a nonpayment of wages is willful when it is not a matter of mere
8 carelessness, but the result of knowing and intentional action.” *Ebling v. Gove’s*
9 *Cove, Inc.*, 34 Wash. App. 495, 500 (1983) (citation omitted).

10 The actor’s “genuine belief that he is not obligated to pay certain wages
11 precludes the withholding of wages from falling within the operation of RCW
12 49.52.050(2) and 49.52.070.” *Id.* (citation omitted). In other words, “a willful
13 withholding [is] ‘the result of knowing and intentional action and not the result of a
14 bona fide dispute as to the obligation of payment.’” *Champagne v. Thurston Cty.*,
15 163 Wash. 2d 69, 81 (2008) (internal quotation marks omitted) (quoting *Wingert v.*
16 *Yellow Freight Sys., Inc.*, 146 Wash. 2d 841, 849 (2002)). A bona fide dispute is a
17 “‘fairly debatable’ dispute over whether an employment relationship exists, or
18 whether all or a portion of the wages must be paid.” *Id.* (quoting *Schilling v. Radio*
19 *Holdings, Inc.*, 136 Wash. 2d 152, 161-62 (1998)). Determining willfulness is
20 generally a question of fact reviewed under the substantial evidence standard. *Id.*

1 However, when no dispute exists as to the material facts, the issue of willfulness
2 may be disposed of summarily. *Id.* at 81-82.

3 Delayed payment of wages owed to an employee may provide a cause of
4 action under RCW 49.52.050(2). *Champagne*, 163 Wash. 2d at 89. In
5 *Champagne*, the county employer paid employees additional pay at the end of the
6 month subsequent to the month in which the pay was earned. *Id.* at 82. The
7 Washington Supreme Court found that this practice violated former Washington
8 Administrative Code 296-128-035, which mandates employers pay employees at
9 certain regular pay intervals. *Id.* at 82. However, the court also found that the
10 practice complied with the governing collective bargaining agreement and that
11 there were no allegations of bad faith or animus motivated by the delayed payment
12 of additional pay. *Id.* Finding a lack of substantial evidence of willful
13 withholding, the court stated that the issue was “more likely a bona fide dispute
14 over whether the wages were due by a certain time.” *Id.*

15 The parties do not dispute that Plaintiff was owed her retroactive pay
16 increase wages. ECF No. 45 at 19; ECF No. 50 at 13. Plaintiff claims she was
17 entitled to the retroactive pay under RCW 28A.405.200, RCW 28A.400.200, and
18 RCW 28A.400.315. ECF No. 26 at 36, ¶ 125. However, none of these statutes
19 required that the retroactive wages to be paid out at a certain time. *See id.*

20 Defendant YSD and Plaintiff were in ongoing settlement negotiations when other

1 superintendents received the retroactive pay wages in March 2018. ECF No. 45 at
2 19. Plaintiff received the full retroactive pay wages in the amount of \$3,228.12 in
3 June 2018 after settlement negotiations broke down. *Id.* The Court finds that there
4 was no statute, ordinance, or contract that mandated Defendants issue her
5 retroactive pay in March 2018 rather than June 2018. *See* RCW 49.52.050(2).
6 Like *Champagne*, this dispute is more likely a bona fide dispute over whether
7 Plaintiff's retroactive wages were due by a certain time. Therefore, summary
8 judgment on this claim is appropriate.

9 **H. Equal Pay Act**

10 Defendants move for summary judgment on Plaintiff's Equal Pay Act
11 ("EPA") claims for retaliation and discrimination. ECF No. 45 at 19-25. Plaintiff
12 argues that there are issues of fact regarding Plaintiff's EPA claims that a jury
13 should decide. ECF No. 50 at 15-20.

14 The EPA is an amendment to the Fair Labor Standards Act ("FLSA") that
15 was created to ensure that "equal work will be rewarded by equal wages." *Rizo v.*
16 *Yovino*, 950 F.3d 1217, 1222 (9th Cir.), *cert. denied*, 141 S. Ct. 189 (2020)
17 (internal quotation and citation omitted). The EPA, by way of the FLSA, prohibits
18 discrimination and retaliation. *See* 29 U.S.C. § 215(a)(2)-(3).

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1 *1. Retaliation*

2 Defendants move for summary judgment on Plaintiff's EPA retaliation claim
3 on the grounds that Plaintiff has not alleged that she asserted any protected EPA
4 right, Plaintiff's role as a manager did not put YSD on notice that Plaintiff was
5 asserting a protected right, and Plaintiff did not suffer any adverse employment
6 action. ECF No. 45 at 19-22. Plaintiff argues it should be for a jury to decide
7 whether her complaint to Defendant Dr. Irion regarding the "Jack Factors" was
8 sufficient to put him on notice that Plaintiff was complaining of gender pay
9 disparities as opposed to carrying out her duties. ECF No. 50 at 15-16.

10 The FLSA prohibits retaliation by an employer against an employee
11 "because such employee has filed any complaint ... under or related to this
12 chapter." 29 U.S.C. § 215(a)(3). To establish a *prima facie* case of retaliation, a
13 plaintiff must show: (a) the defendant was aware of the plaintiff's participation in a
14 protected activity, (b) an adverse employment action was taken against the
15 plaintiff, and (c) the protected activity was a substantial motivating factor in an
16 adverse employment action against the plaintiff. *Bowen v. M. Cataran, Inc.*, 142
17 F. Supp. 3d 1007, 1021 (E.D. Cal. 2015) (citing *Lambert v. Ackerley*, 180 F.3d
18 997, 1007 (9th Cir. 1999)). The FLSA is a remedial statute that should be
19 interpreted broadly. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S.
20 1, 13 (2011).

1 a. Notice of Protected Activity

2 As relevant here, oral complaints are sufficient to invoke the antiretaliation
3 provision of the FLSA. *Kasten*, 563 U.S. at 17. However, the FLSA also “seeks to
4 establish an enforcement system that is fair to employers.” *Id.* at 13. As such, an
5 employer “must have fair notice that an employee is making a complaint that could
6 subject the employer to a later claim of retaliation.” *Id.* The Ninth Circuit has
7 recognized that the “fair notice” rule is likely consistent with the “manager rule”
8 under the FLSA. *Rosenfield v. GlobalTranz Enterprises, Inc.*, 811 F.3d 282, 286
9 (9th Cir. 2015). Ultimately, the analysis of whether an employer had notice that an
10 employee was making a complaint that is protected activity under the EPA/FLSA
11 is informed by:

12 The employee’s job title and responsibilities – in particular, whether
13 he or she is a manager – form a part of that “context.” Generally
14 speaking, managers are in a different position vis-a-vis the employer
15 than are other employees because (as relevant here) their employer
16 expects them to voice work-related concerns and to suggest changes
17 in policy to their superiors. That may be particularly true with respect
18 to upper-level managers who are responsible for ensuring compliance
19 with the FLSA.

20 If an entry-level employee reported that someone is underpaid in
violation of the FLSA and requested that the employee be
compensated in compliance with the Act, a reasonable employer
almost certainly would understand that reports as a “complaint”
(depending, of course, on all of the circumstances). But if the
identical report were made by a manager tasked with ensuring the
company’s compliance with the FLSA, a reasonable employer almost
certainly would *not* understand that report as a “complaint” (again,
depending on all the circumstances). Rather, the employer naturally

1 would understand the manager's report as carrying out his or her
2 duties. In short, when determining whether an employee has "filed
3 any complaint," the employee's role as a manager often is an
4 important contextual element.

5 *Id.* at 286. In *Rosenfield*, the plaintiff employee served as either the Manager or
6 Director of Human Resources but was not responsible for FLSA compliance. *Id.* at
7 288. Plaintiff raised concerns to her boss who was in charge of FLSA compliance,
8 complained orally on at least eight occasions to management, provided specific
9 assertions and copies of the statute to management, and raised the FLSA violations
10 in at least 27 weekly and monthly reports to her supervisors. *Id.* The Ninth Circuit
11 found that, despite the plaintiff's managerial position, "a reasonable jury could find
12 that Plaintiff's advocacy reached the requisite degree of formality to constitute
13 protected activity." *Id.*

14 Here, construing the evidence in light most favorable to Plaintiff, a jury
15 could not reasonably conclude that Plaintiff provided fair notice of her EPA
16 complaint to her employer. Plaintiff does not dispute that she was a manager
17 "charged with varied Human Resources matters." ECF No. 50 at 15. As the
18 Superintendent of Human Resources, Plaintiff's job description demonstrates she
19 was tasked with reviewing and interpreting applicable state and federal
20 employment laws and regulations and monitoring such compliance as well as
coordinating, establishing, and maintaining sound salary and wage administration

1 practices. ECF No. 46-1 at 25-26. Additionally, YSD used Plaintiff for legal
2 opinions, guidance, and interpretation on federal laws as she is a licensed attorney.
3 See ECF No. 51 at 11, ¶¶ 29-32.

4 In the context of these duties, Plaintiff alleges she made only one statement
5 to Dr. Irion to the effect of: “The Jack Factors are creating a spiral that is causing
6 the men to be paid more than women. We are going to keep paying men more than
7 women if we keep using these factors. This is gender-based pay discrimination is
8 going to cause the District liability. And I will not support it.” ECF No. 50 at 15
9 (citing ECF No. 51 at 30, ¶ 73(e)).⁵ In light of Plaintiff’s top managerial position
10 and job duties that included legal advice, the employer would not have understood
11 this single statement, if it had occurred, to be an assertion of rights protected by the

12
13 ⁵ Plaintiff’s brief asserts that she made the same statement to Ms. Mahre.
14 ECF No. 51 at 30. Plaintiff’s Statement of Facts supports that the statement was
15 made to Dr. Irion, which Defendants dispute. ECF No. 51 at 30, ¶ 73(e); ECF No.
16 57 at 8, ¶ 73. Plaintiff otherwise generally asserts that “she had expressed [her]
17 concerns about the Jack Factors to others, like Ms. Mahre.” ECF No. 51 at 30, ¶
18 73(d). Even if these unspecified conversations occurred, Plaintiff has not shown
19 that she made such reports in a manner and frequency that rises to the requisite
20 degree of formality to constitute protected activity. *Rosenfield*, 811 F.3d at 288.

1 FLSA. *See Rosenfield*, 811 F.3d at 288. Therefore, Defendants were not on notice
2 of Plaintiff's protected activity. Summary judgment on this claim is appropriate.

3 2. *Discrimination*

4 Defendants move for summary judgment on Plaintiff's EPA discrimination
5 claim for lower wages on the grounds that Plaintiff did not perform substantially
6 equal work and that Plaintiff lacks evidence that the pay differential was made on
7 the basis of sex. ECF No. 45 at 23-25. Plaintiff argues that she was paid different
8 wages for substantially equal work compared to another superintendent position.
9 ECF No. 50 at 17-20.

10 Regarding sex discrimination, the EPA provides:

11 No employer having employees subject to any provisions of this
12 section shall discriminate, within any establishment in which such
13 employees are employed, between employees on the basis of sex by
14 paying wages to employees in such establishment at a rate less than
15 the rate at which he pays wages to employees of the opposite sex in
such establishment for equal work on jobs the performance of which
requires equal skill, effort, and responsibility, and which are
performed under similar working conditions. . . .

16 29 U.S.C. § 206(d)(1). The plaintiff bears the burden of establishing a *prima facie*
17 case of discrimination that employees of different sex were paid different wages
18 for equal work. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1073-74 (9th Cir.
19 1999). If the plaintiff can establish a *prima facie* case, the defendant can show
20 "such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a

1 system which measures earnings by quantity or quality of production; or (iv) a
2 differential based on any other factor other than sex” to operate as an affirmative
3 defense. 29 U.S.C. § 206(d)(1); *Rizo v. Yovino*, 950 F.3d at 1222. The inquiry
4 ends there: Plaintiff is not required to show pretext because EPA cases do not
5 follow the burden-shifting framework set out in *McDonnell Douglas*. *Rizo*, 950
6 F.3d at 1223.

7 a. Prima Facie Case

8 The plaintiff must demonstrate that the compared jobs – not the individuals
9 – are “substantially equal.” *Stanley*, 178 F.3d at 1074. Under the “substantially
10 equal” analysis, the court looks to: (1) whether the jobs share a common core of
11 tasks; and (2) whether the additional tasks make the jobs substantially different.
12 *Id.* “[T]he jobs need not be identical, but must require similar skills, effort and
13 responsibility performed under similar conditions; it is actual job performance
14 requirements, rather than job classifications or titles, that is determinative.”
15 *E.E.O.C. v. Maricopa Cty. Cmty. Coll. Dist.*, 736 F.2d 510, 513 (9th Cir. 1984).
16 On summary judgment, a reasonable jury could find that two positions share a
17 common core of tasks and do substantially equal work if the evidence is “not so
18 one-sided as to mandate [a] conclusion as a matter of law.” *Freyd v. Univ. of*
19 *Oregon*, No. 19-35428, 2021 WL 958217, at *7 (9th Cir. Mar. 15, 2021).

1 Here, there is no dispute that Mr. Izutsu as Associate Superintendent of
2 Financial Services was paid more than Plaintiff as Assistant Superintendent of
3 Human Resources. ECF No. 50 at 17. Defendants assert that there are “substantial
4 differences between Mr. Izutsu’s job and Plaintiff’s jobs [that] are apparent by
5 reviewing the job descriptions for the two jobs.” ECF No. 45 at 24. On the other
6 hand, Plaintiff points to several similarities in the job positions. ECF No. 50 at 18-
7 19. The positions in the Superintendent Group were “all connected” so that the
8 superintendents “all played a role in supporting whatever it is [YSD is] working
9 on.” ECF No. 51 at 8, ¶ 21. Specifically, Mr. Izutsu and Plaintiff’s positions
10 aligned in terms of both: (a) reporting to Dr. Irion, (b) working as part of the
11 Superintendent Group, (c) complying with the terms and conditions of the
12 District’s Management Team Handbook, (d) being subject to the same Collective
13 Bargaining Agreement, (e) maintaining offices at YSD’s Central Services building,
14 (f) leading various bargaining teams, (g) working similar hours, (h) playing key
15 roles in YSD’s budgeting and staffing, (i) signing warrants and contracts on YSD’s
16 behalf, and (j) being required to attend the same Board Meetings, Management
17 Team Meetings, and Cabinet Meetings. ECF No. 50 at 18. Mr. Izutsu and
18 Plaintiff also shared the responsibility of facilitating the transition of students from
19 eighth to ninth grade, running start matters, student transfer matters, approving
20 overtime, addressing workplace accommodation issues, and addressing risk

1 management/safety matters. *Id.* While the job descriptions point to differences in
2 job duties between the Financial and Human Resources divisions, Plaintiff states
3 she had the same 6 out of 11 Major Responsibilities in Mr. Izutsu's position and
4 conducted parallel work as to 2 other Major Responsibilities. *Id.* at 18-19. Finally,
5 Plaintiff asserts that she had more job duties than Mr. Izutsu in term of advising
6 YSD on compliance with various federal laws in which YSD "could access her for
7 legal opinions, guidance, [and] interpretation" even though Plaintiff was not the
8 "attorney by title in our district." *Id.* at 19 (citing ECF No. 51 at 11, ¶¶ 29-30).

9 Based on the similarities and overlap in duties, Mr. Izutsu and Plaintiff's
10 positions appear to share a common core of tasks and any additional tasks do not
11 make the positions substantially different. In any event, the Court finds that the
12 comparison does not result in a conclusion so "one-sided" as to determine that the
13 jobs are substantially different as a matter of law. *See Freyd*, 2021 WL 958217, at
14 *7. Therefore, Plaintiff has established a *prima facie* case of EPA discrimination.

15 a. Affirmative Defense

16 Plaintiff asserts that Defendants waived any affirmative defense by not
17 pleading such in the answer. ECF No. 50 at 19. However, affirmative defenses are
18 not waived if the plaintiff is not prejudiced where such a defense is raised for the
19 first time on summary judgment. *See Camarillo v. McCarthy*, 998 F.2d 638, 639
20 (9th Cir. 1993). Plaintiff also argues that YSD "could not substantively explain the

1 pay differences between [Plaintiff] and Mr. Izutsu nor did YSD conduct any
2 assessment to determine whether gender influenced such pay decisions” and that
3 Plaintiff’s past pay does not satisfy the “other factor other than sex” criteria. ECF
4 No. 50 at 19-20.

5 Notably, Plaintiff ignores YSD’s apparent reason for paying Mr. Izutsu more
6 than Plaintiff: Mr. Izutsu had worked as a superintendent with YSD for 15 years
7 before Plaintiff was hired and had attained Step 6 of Associate Superintendent.
8 ECF No. 45 at 23. This significant professional experience as a superintendent that
9 Plaintiff did not have – this was her first position as a superintendent – is the sort
10 of pay differential that is based on a factor other than sex. *See Stanley*, 178 F.3d
11 1069 (holding that employers “may reward professional experience without
12 violating the EPA). It is not clear how Plaintiff is prejudiced by this affirmative
13 defense of experience to preclude Defendants from raising such on summary
14 judgment. Therefore, summary judgment on this claim is appropriate

15 **I. Washington Law Against Discrimination**

16 Defendants move for summary judgment on Plaintiff’s Washington Law
17 Against Discrimination (“WLAD”) claim for retaliation on the grounds that
18 Plaintiff cannot meet her burden of proof as a matter of law on the grounds that
19 “no reasonable jury could find that Defendants retaliated against her by placing her
20 on administrative leave and not renewing her contract for the next school year

1 because she allegedly ‘opposed illegal activities’ between March 13, 2017 and
2 November 6, 2017.” ECF No. 45 at 25-26. Plaintiff argues that issues of fact exist
3 regarding Plaintiff’s WLAD retaliation claim because Defendants’ reasons for
4 placing Plaintiff on administrative leave is “non-sensical,” Defendants’
5 justification for “ending [Plaintiff’s] career with YSD evolved over time,” YSD
6 treated Plaintiff different than other similarly situated workers, YSD did not
7 engage in any progressive discipline with Plaintiff, and the proximity in time from
8 one of Plaintiff’s oppositional activities and administrative leave is probative of
9 causation. ECF No. 50 at 20-23.

10 The WLAD prohibits discrimination against any individual on the basic
11 protected characteristics such as sex, race, national origin, and physical disability.
12 RCW 49.60.010. Under the WLAD, “[i]t is an unfair practice for any employer ...
13 to discharge, expel, or otherwise discriminate against any person because he or she
14 has opposed any practices forbidden by this chapter.” RCW 49.60.210(1). The
15 provisions of the WLAD are to be construed liberally. RCW 49.60.020.

16 A WLAD retaliation claim is analyzed under the *McDonnell Douglas*
17 burden-shifting framework. *Cornwell v. Microsoft Corp.*, 192 Wash. 2d 403, 411
18 (2018) (citing *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wash. 2d
19 516, 527 (2017)). First, the plaintiff must make a *prima facie* case for her claim,
20 here retaliation. *Mikkelsen*, 189 Wash. 2d at 527. If the plaintiff makes a *prima*

1 *facie* case, the burden shifts to the defendant who must “articulate a legitimate,
2 nondiscriminatory reason for the adverse employment action.” *Id.* (internal
3 quotation and citation omitted). If the defendant meets this burden, the burden
4 shifts back to the plaintiff to produce sufficient evidence that the defendant’s
5 reason was pretext. *Id.*

6 *1. Prima Facie Case*

7 To establish a *prima facie* case for WLAD retaliation, a plaintiff must show
8 “(1) the employee took a statutorily protected action, (2) the employee suffered an
9 adverse employment action, and (3) a causal link between the employee’s
10 protected activity and the adverse employment action.” *Cornwell*, 192 Wash. 2d at
11 411.

12 To establish protected activity, Plaintiff asserts she engaged in protected
13 activity by opposing “numerous examples of gender, race, religious, and disability
14 discrimination” between March 13, 2017 and November 6, 2017. ECF No. 50 at
15 20; *see also* ECF No. 45 at 25. Defendants do not challenge that Plaintiff engaged
16 in protected activity but generally object to the alleged oppositional activity on
17 grounds of relevancy and hearsay.⁶ *See* ECF No. 45 at 25; ECF No. 55 at 6.

18
19 ⁶ Admissibility of evidence on summary judgment is focused on content, not
20 form. *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003). While Defendants object

1 Defendants admit that Plaintiff raised workplace concerns and while generally
2 denying some allegations occurred, acknowledge there “may have been” other
3 instances where Plaintiff told Dr. Irion that YSD was violating the law. ECF No.
4 57 at 6, ¶¶ 43-44; ECF No. 51 at 42, ¶ 91. Viewing the evidence in light most
5 favorable to Plaintiff, Plaintiff opposed employment practices forbidden by
6 antidiscrimination law or practices that she reasonably believed to be
7 discriminatory by reporting instances and opposition to various situations at YSD
8 involving staff and student gender, religion, national origin, and physical
9 disabilities. *Alonso v. Qwest Commc’ns Co., LLC*, 178 Wash. App. 734, 746
10 (2013). Therefore, while Defendants can argue that any opposition occurred in the
11 scope of her job responsibilities, for purpose of Defendant’s summary judgment
12 motion, Plaintiff has established the first element of her *prima facie* WLAD
13 retaliation claim.

14 To establish an adverse employment action, “[a]n adverse employment
15 action involves a change in employment conditions that is more than an
16 inconvenience or alteration of one’s job responsibilities, such as reducing an
17 employee’s workload and pay.” *Alonso v. Qwest Comm’s Co., LLC*, 178 Wash.

18 _____
19 on hearsay grounds, Plaintiff is not precluded from presenting her oppositional
20 activity at trial in other forms. *See, e.g.*, ECF No. 51 at 16, ¶¶ 45-66, 80.

1 App. 734, 746 (2013). Whether an action “is materially adverse depends upon the
2 circumstances of the particular case, and ‘should be judged from the perspective of
3 a reasonable person in the plaintiff’s position.’” *Tyner v. State*, 137 Wash. App.
4 545, 565 (2007). It is undisputed that Plaintiff was placed on administrative leave
5 for the majority and remainder of the school year and was paid in full under the
6 contract. Viewing the evidence in light most favorable to Plaintiff, a reasonable
7 jury could conclude that Plaintiff suffered an adverse employment action in light of
8 the circumstances in which she was placed on administrative leave for the majority
9 of school year and was never able to return to work. *See Waite v. Gonzaga Univ.*,
10 No. 2:17-CV-00416-SAB, 2019 WL 544947, at * 5 (E.D. Wash. Feb. 11, 2019)
11 (citing cases that recognize administrative leave may constitute retaliatory
12 conduct). Therefore, for purpose of Defendant’s summary judgment motion,
13 Plaintiff has established the second element of her *prima facie* WLAD retaliation
14 claim.

15 To establish causation, a plaintiff must merely show that the retaliation was
16 a “substantial factor” in the adverse employment action. *Allison v. Hous. Auth.*,
17 118 Wash. 2d 79, 81 (1991). Plaintiff provides several arguments to establish
18 causation: Defendants’ reasons for placing Plaintiff on administrative leave is
19 “non-sensical,” Defendants’ justification for “ending [Plaintiff’s] career with YSD
20 evolved over time,” YSD treated Plaintiff different than other similarly situated

1 workers, YSD did not engage in any progressive discipline with Plaintiff, and the
2 proximity in time from one of Plaintiff's oppositional activities and administrative
3 leave is probative of causation. ECF No. 50 at 20-23. Viewing the evidence in
4 light most favorable to Plaintiff, Plaintiff has shown that Plaintiff's oppositional
5 activities were a "substantial factor" in being placed on administrative leave. First,
6 Plaintiff has demonstrated temporal proximity regarding at least one of Plaintiff's
7 oppositional activity: her report regarding the handling of an employee's
8 accommodations due to physical disability occurred six days prior to being placed
9 on administrative leave.⁷ ECF No. 51 at 34, ¶ 80(f); *Yartzoff v. Thomas*, 809 F.2d
10 1371, 1376 (9th Cir. 1987). Second, Plaintiff has demonstrated that she was
11 treated different to similarly situated workers, i.e., YSD charged other employees
12 with insubordination but did not terminate or otherwise discipline the employees.
13 ECF No. 50 at 22.⁸ Based on the timing, different treatment, and the undisputed

14
15 ⁷ While Defendants deny Plaintiff's factual assertion, *see* ECF No. 57 at 10, ¶
16 80, the record demonstrates that Dr. Irion and Ms. Mahre admitted that there were
17 conversations regarding the same employee's physical accommodations. *See* ECF
18 No. 53-2 at 45; ECF No. 53-4 at 96.

19 ⁸ It is unclear if any of these other employees were ever placed on
20 administrative leave.

1 record that Dr. Irion was aware of at least some of Plaintiff's oppositional activity
2 prior to the adverse employment action, there is more than sufficient evidence to
3 demonstrate causation for purposes of summary judgment. *Cornwell v. Microsoft*
4 *Corp.*, 192 Wash. 2d 403, 412-413 (2018). Therefore, viewing the evidence in
5 light most favorable to Plaintiff, Plaintiff has made out a *prima facie* case for
6 WLAD retaliation.

7 2. *Legitimate Nondiscriminatory Reason*

8 Defendants claim that the legitimate, nondiscriminatory reason for placing
9 Plaintiff on paid administrative leave was due to Plaintiff's "insubordination in
10 refusing to provide a straight answer to Dr. Irion's question about whether a
11 procedure the District was using was legal after she previously reported – after
12 conferring with the District's legal counsel – that the procedure was legal." ECF
13 No. 55 at 6. Insubordination is a legitimate nondiscriminatory reason for placing
14 an employee on administrative leave. *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas*
15 *Cty.*, 189 Wash. 2d 516, 533, 34 (2017).

16 3. *Pretext*

17 Once the defendant meets the burden to show a legitimate nondiscriminatory
18 reason, the plaintiff must "produce sufficient evidence showing that the
19 defendant's alleged nondiscriminatory reason for the adverse employment action
20 was a pretext." *Mikkelsen*, 189 Wash. 2d at 534. Here, viewing the evidence in

1 light most favorable to Plaintiff, a reasonable jury could conclude that Defendants’
2 alleged varying reasons for placing Plaintiff on administrative leave including that
3 she would not provide legal advice even though she was not general counsel to
4 YSD, coupled with the lesser disciplinary treatment of employees charged with
5 insubordination and timing from her last oppositional activity, there are genuine
6 issues of material fact as to whether Plaintiff was terminated in retaliation for her
7 continued opposition to YSD’s perceived unlawful discriminatory activity.
8 Therefore, summary judgment is not appropriate on this claim.

9 **J. Discharge in Violation of Public Policy**

10 Defendants move for summary judgment on Plaintiff’s Washington
11 Discharge in Violation of Public Policy (“WDVPP”) claim on the grounds that
12 Plaintiff was not discharged from employment when she was placed on
13 administrative leave and that Plaintiff cannot establish causation by temporal
14 proximity. ECF No. 45 at 34-37. Plaintiff argues that she was discharged from
15 employment after Defendants’ failed to offer Plaintiff continued employment after
16 her contract expired, public policy concerns are implicated where Plaintiff opposed
17 conduct that is prohibited by statute, and that the temporal proximity of events is
18 sufficient to establish causation. ECF No. 50 at 31-33.

19 The tort of WDVPP is narrowly construed and is generally applied to only
20 four scenarios: “(1) where employees are fired for refusing to commit an illegal

1 act; (2) where employees are fired for performing a public duty or obligation, such
2 as serving jury duty; (3) where employees are fired for exercising a legal right or
3 privilege, such as filing workers' compensation claims; and (4) where employees
4 are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.”
5 *Rose v. Anderson Hay and Grain Co.*, 184 Wash. 2d 268, 276 (2015). When a
6 wrongful discharge claim does not clearly fit into one of these categories, the court
7 must instead consider the following “Perritt framework” to determine whether the
8 claimant was wrongfully discharged in violation of public policy: (1) the existence
9 of a clear public policy; (2) that discouraging the conduct in which the plaintiff
10 engaged would jeopardize the public policy; (3) that the public policy-linked
11 conduct caused the dismissal; and (4) that the defendant has not offered an
12 overriding justification for the dismissal of the plaintiff. *Gardner v. Loomis*
13 *Armored Inc.*, 128 Wash. 2d 931, 941 (1996). Here, the four main categories do
14 not apply because Plaintiff alleges she was discharged after she was placed on paid
15 administrative leave and then her contract was not renewed. Thus, the Perritt
16 framework applies.

17 Defendants now move for summary judgment on the grounds that Plaintiff
18 was never discharged from her position. ECF No. 45 at 36. Whether an employee
19 was discharged is a question of fact. *Little v. Windermere Relocation, Inc.*, 301
20 F.3d 958, 971 (9th Cir. 2002) (genuine issues of fact, including whether Plaintiff

1 was discharged or resigned, precluded summary judgment on WDVPP claim). The
2 Court addressed Plaintiff's WDVPP claim when Plaintiff sought to certify this
3 issue to the Washington State Supreme Court. ECF No. 44. In that Order, the
4 Court found that "[u]nder present Washington law, an employee is not discharged
5 where she continues to receive a salary and benefits on a one-year contract that is
6 subsequently not renewed." *Id.* at 44. The tort of wrongful discharge in violation
7 of public policy only applies when an employee has been discharged. *Roberts v.*
8 *Dudley*, 140 Wash. 2d 58, 76 (2000). Placing an individual on paid administrative
9 leave until the employment contract expires and is not renewed does not constitute
10 a discharge. *See Korslund v. Dyncorp. Tri-Cities Servs., Inc.*, 121 Wash. App. 295,
11 316 (2004), *aff'd*, 156 Wash. 2d 168, 180 (2005) (finding no discharge where
12 employee did not permanently leave her position because she continued to receive
13 a salary and benefits); *see also Davis v. Tacoma Sch. Dist.*, 188 Wash. App. 1043
14 (2015) (discussing difference between discharge and nonrenewal of school district
15 employees).

16 "[W]here the employee continues to receive employment benefits and is still
17 considered to be an active employee, or where his or her ability to return to work is
18 protected in some other way, that employee has not been constructively
19 discharged." *Korslund*, 156 Wash. 2d 168, 180 (2005), *overruled on other*
20 *grounds by Rose v. Anderson Hay & Grain Co.*, 184 Wash. 2d 268 (2015). Under

1 this standard, “the focus is on whether the employee *permanently* left the job, not
2 on whether he or she technically resigned.” *Korslund v. Dyncorp Tri-Cities Servs.,*
3 *Inc.*, 121 Wash. App. 295, 315 (2004). This rule is consistent with the Washington
4 Supreme Court’s statement that “[s]ubjecting each disciplinary decision of an
5 employer to the scrutiny of the judiciary would not strike the proper balance
6 between the employer’s right to run his business as he sees fit and the employee’s
7 right to job security.” *White v. State*, 131 Wash. 2d 1, 20 (1997).

8 It is undisputed that after Plaintiff was placed on paid administrative leave
9 and received all benefits under her one-year contract, after which the contract was
10 not renewed. ECF No. 50 at 31. Plaintiff attempts to draw a parallel to the
11 situation in *Korslund*, where the court found that a jury could find an employee
12 permanently left his job where he received full salary and benefits up to a certain
13 point, proceeded to receive only disability payments, then only unpaid medical
14 leave before ultimately receiving unemployment benefits. *Korslund*, 121 Wash.
15 App. at 315-16. That case is clearly distinguishable. The plaintiff in that case did
16 not continue to receive full salary and benefits through his employment as he had
17 to go on unpaid medical leave and eventually received unemployment benefits.
18 Here, Plaintiff received all benefits that were due under her one-year contract. As
19 discussed *supra*, she was not entitled to challenge her non-renewal as a non-

1 certificated employee. No reasonable jury could find that she was discharged.

2 Therefore, Defendants are entitled to summary judgment on this claim.

3 **K. Breach of Contract**

4 Defendants move for summary judgment on Plaintiff's breach of contract
5 claim on the grounds that the Letter of Intent was erroneous, the modified Letter
6 entitled Plaintiff to thousands more in salary, and Plaintiff was paid in full for her
7 one-year contract. ECF No. 45 at 43. Plaintiff argues that Defendants ignore the
8 claim set out in the Third Amended Complaint and that Defendants should be
9 equitably estopped from claiming a Collective Bargaining Agreement ("CBA") did
10 not exist. ECF No. 50 at 33-34. In reply, Defendants argue that Plaintiff could
11 not have assented to terms in a CBA that does not exist. ECF No. 55 at 9-10.

12 Under Washington law, a plaintiff "must prove a valid contract between the
13 parties, breach, and resulting damage." *Lehrer v. State, Dep't of Soc. & Health*
14 *Servs.*, 101 Wash. App. 509, 516 (2000) (internal citation omitted). There must be
15 mutual assent to any terms that are incorporated by reference so that it is "clear that
16 the parties to the agreement had knowledge of and assented to the incorporated
17 terms." *Burnett v. Pagliacci Pizza, Inc.*, 196 Wash. 2d 38, 49 (2020) (internal
18 citation and quotation omitted). "Mutual assent is gleaned from outward
19 manifestations and circumstances surrounding the transaction." *Id.* at 50.

20 //

1 Here, Plaintiff provides a copy of the CBA that she “[u]pon arriving at YSD
2 [she] reviewed what [she] understood was the operative CBA” referenced in her
3 contract. ECF No. 52 at 7, ¶ 18. However, the CBA is between the “Yakima
4 Principals’ and Directors’ Associations and Yakima Public Schools.” ECF No. 52-
5 2. The CBA plainly states that the CBA applies to administrators who “are not
6 recognized by the superintendent as members of the principals’ or
7 assistant/associate superintendents’ group.” ECF No. 52-2 at 6, ¶ 1.2(B).

8 There is no evidence that Plaintiff reviewed a CBA or was aware of any
9 such terms incorporated at the time she signed her employment contract. Plaintiff
10 only reviewed a CBA upon her arrival to YSD, a CBA that expressly does not
11 apply to her. ECF No. 52 at 7, ¶ 18; ECF No. 52-2 at 6, ¶ 1.2(B). Because such a
12 CBA did not in fact exist, Plaintiff did not have had knowledge of the terms she
13 attempts to incorporate into her contract. Therefore, there is no mutual assent to a
14 non-existent CBA that was referenced in her employment contract.

15 Plaintiff also asserts that Defendants should be equitably estopped from
16 “changing its position” because YSD contended that a CBA did not exist for the
17 first time in deposition testimony. ECF No. 50 at 34. Affirmative defenses are not
18 waived if the plaintiff is not prejudiced where such a defense is raised for the first
19 time on summary judgment. *See Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th
20 Cir. 1993). There is no evidence that Defendants “changed” positions regarding

1 the CBA merely because they asserted that it did not exist for the first time at a
2 deposition. Plaintiff was not unfairly prejudiced when there is no evidence that
3 any CBA ever applied to her. Defendants are entitled to summary judgment on
4 this claim.

5 **L. Public Records Act**

6 Defendants move for summary judgment on Plaintiff's Public Records Act
7 ("PRA") claim on the grounds that the claim is not suitable for adjudication in
8 federal court, the claim should be remanded to state court, and Plaintiff should not
9 benefit from her "abusive records requests." ECF No. 45 at 37-38. Plaintiff argues
10 federal courts in this District have decided PRA claims and that Defendants' claim
11 of "abusive records request" does not exist as an affirmative defense. ECF No. 50
12 at 35.

13 Defendants do not substantively address Plaintiff's PRA claims. As
14 discussed *infra*, only state law claims survive summary judgment. As such, the
15 Court declines supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) on this
16 purely state law issue. The PRA claim will be better addressed in state court.

17 **M. Voluntary Dismissal**

18 In response to Defendants' motion for summary judgment, Plaintiff
19 withdrew her defamation and intentional infliction of emotional distress claims.
20 ECF No. 50 at 35. Therefore, summary judgment on these claims is appropriate.

N. Supplemental Jurisdiction

Supplemental jurisdiction may be raised by the parties or *sua sponte* by the Court. *See Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 n.3 (9th Cir. 1997) (en banc). A federal court has supplemental jurisdiction over pendent state law claims to the extent they are “so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy....” 28 U.S.C. § 1367(a). “A state law claim is part of the same case or controversy when it shares a ‘common nucleus of operative fact’ with the federal claims and the state and federal claims would normally be tried together.” *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004) (internal citation omitted).

Once the court acquires supplemental jurisdiction over state law claims, the court may decline to exercise jurisdiction under several circumstances, including where “the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). “[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988), *superseded on other grounds by statute as stated in Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010). “[D]istrict courts may decline to exercise jurisdiction over supplemental state law claims in the interest of judicial economy, convenience, fairness and

1 comity.” *Smith v. Lenches*, 263 F.3d 972, 977 (9th Cir. 2001) (citing *City of*
2 *Chicago v Int’l Coll. of Surgeons*, 522 U.S. 156, 172-73 (1997)).

3 Here, the Court determined that Defendants are entitled to summary
4 judgment on Plaintiff’s federal claims over which the Court had original
5 jurisdiction and some of those state claims for which the Court has supplemental
6 jurisdiction; this triggers the discretion to decline supplemental jurisdiction on the
7 remaining state claims. *See Acri v. Varian Assocs., Inc.*, 114 F.3d at 1001. In the
8 interest of judicial economy, convenience, fairness and comity, the Court
9 determines that the state law claims based on the Washington Law Against
10 Discrimination and Washington Public Records Act would be better addressed in
11 state court. The parties will not be overly inconvenienced where this case is at the
12 summary judgment stage and the parties’ completed discovery and briefing can be
13 utilized if Plaintiff chooses to refile in state court. Further, in fairness to Plaintiff,
14 the period of limitation for Plaintiff’s remaining state law claims is tolled for thirty
15 days after the claims are dismissed unless Washington law provides for a longer
16 tolling period. *See* 28 U.S.C. § 1367(d). For these reasons, the Court declines to
17 exercise supplemental jurisdiction over Plaintiff’s state law claims.

18 **ACCORDINGLY, IT IS HEREBY ORDERED:**

19 1. Defendants’ Motion for Summary Judgment (ECF No. 45) is

20 **GRANTED in part and DENIED in part.** Judgment shall be entered in

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT AND DENYING AS MOOT
DEFENDANTS’ MOTION FOR LEAVE TO FILE DECLARATION ~ 61

1 favor of Defendants on the 42 U.S.C. § 1983 claims, the Family and
2 Medical Leave Act claims, the Washington State Wage Rebate Act
3 claims, Equal Pay Act claims, the Washington Discharge in Violation of
4 Public Policy claims, the breach of contract claims, the defamation
5 claims and intentional infliction of emotional distress claims.

6 2. Plaintiff's remaining two state law claims brought under the Washington
7 Law Against Discrimination and Washington Public Records Act are
8 **DISMISSED** under 28 U.S.C. § 1367(c)(3) **without prejudice**.

9 3. Defendants' Motion for Leave to File the Declaration of Karen Hovis
10 (ECF No. 66) is **DENIED as moot**.

11 4. All remaining motions, hearings, and trial are **VACATED as moot**.

12 The District Court Executive is directed to enter this Order, enter Judgment
13 accordingly, furnish copies to counsel, and **CLOSE** the file.

14 DATED March 26, 2020.



Thomas O. Rice
THOMAS O. RICE
United States District Judge